

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In reply refer to:
188B3-KDY

February 16, 1996

Mark N. Lipp, Esquire
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1225 Connecticut Avenue, N.W. - Suite 300
Washington, D.C. 20036-2604

In re: WPMZ(AM), East Providence, Rhode Island
Request for Special Temporary Authority

Dear Mr. Lipp:

We have on file Bear Broadcasting Company's ("Bear") February 7, 1996, Request for Special Temporary Authority ("STA") to operate station WPMZ(AM), East Providence, Rhode Island, at night. Also on file is Bear's February 9, 1996, Revised Request for STA. Carter Broadcasting Corporation ("Carter") ([see Footnote 1](#)) has filed an opposition to Bears' February 7, 1996, STA request. [See Footnote 2](#). Additionally, by letter dated February 6, 1996, Jefferson-Pilot Communications Company ("Jefferson-Pilot"), licensee of station WBT(AM), Charlotte, North Carolina provides a copy of an earlier-filed interference complaint regarding WPMZ(AM)'s nighttime operation. [See Footnote 3](#). As set forth below, we deny Bear's STA request and order WPMZ(AM) to immediately cease and desist nighttime operation.

Background. Station WPMZ(AM) is a Class D Station authorized to operate on 1110 kHz with 5,000 watts, daytime only. [See Footnote 4](#). Bear indicates that on January 1, 1986, WPMZ(AM) ([see Footnote 5](#)) began nighttime operations with 250 watts under Bear's predecessor, WHIM Radio ("WHIM"). Bear contends that WHIM began this operation based upon its attorney's written advice that the Commission had orally authorized WPMZ(AM)'s nighttime operation. [See Footnote 6](#). Bear does not provide a copy of a Commission authorization for this nighttime operation. Bear states that in 1989 it acquired WPMZ(AM) without the "knowledge that there may a question surrounding the nighttime authority." ([see Footnote 7](#)). Bear alleges that it wasn't until "seven years later" that it "discovered that a mistake had been made."

Bear states that, subsequent to this "discovery," it met with the former Chief, Audio Services Division and the former Chief, AM Branch to report that it could not find an authorization for WPMZ(AM)'s nighttime operation. Bear contends that, as a result of this meeting, it was told that WPMZ(AM) could continue to operate at night "until the staff could review the matter in the form of an STA request." On June 30, 1993, Bear filed an STA request

contending that, in 1987, when the staff allegedly gave oral authorization, the Commission "may not have properly authorized the nighttime power." Bear's STA request offered three options for continuing WPMZ(AM)'s nighttime operation: (1) a permanent authorization for nighttime operation with 250 watts at night; (2) a split frequency ([see Footnote 8](#)) whereby WPMZ(AM) would operate on 1120 kHz at night with 100 watts; and (3) an authorization permitting WPMZ(AM) to migrate to the expanded band. [See Footnote 9](#). By letter dated July 20, 1993 ("STA Denial Letter"), the Commission staff informed Bear that its request for temporary authority was denied; that the Commission's records indicated that WPMZ(AM) did not receive a show cause order authorizing nighttime operations; and that if Bear desired to operate WPMZ(AM) at night, Bear must file an application on FCC Form 301. [See Footnote 10](#). Bear did not file a petition for reconsideration of that letter.

Almost three years later, on February 7, 1996, Bear filed the subject request for STA. Bear requests authority to allow WPMZ(AM) "to continue operating at night with its current power of 250 watts or some lesser amount that the Commission may determine." [See Footnote 11](#). Bear references its June 30, 1993 STA request and repeats the circumstances - originally set forth in the June 30, 1993, STA request - that led to WPMZ(AM)'s present nighttime operation. Bear again requests STA allowing WPMZ(AM) "to provide East Providence with its only local service at night." [See Footnote 12](#). Bear contends that Commission staff "has not formally responded" to the June 30, 1993, STA request. Bear further alleges that, based upon subsequent oral conversations with the Commission staff, the STA Denial Letter ([see Footnote 13](#)) "was not properly authorized and not an official response." Bear also maintains that "there would appear to be no urgency to terminate [WPMZ(AM)'s nighttime service] given that Bear has no knowledge of WBT(AM), Charlotte, North Carolina, complaining of interference during WPMZ(AM)'s ten years of nighttime operations.

Carter opposes Bear's STA request. Carter argues that Bear's failure to perform due diligence when purchasing WPMZ(AM) is not a valid basis to now grant the relief Bear seeks; that Bear has knowingly operated WPMZ(AM) at variance from its license since 1992; that in 1993 Bear's request for STA was denied by the Commission; that Carter is losing advertisers to WPMZ(AM) because Bear sells air time on the basis of its superior, albeit illegal, nighttime service; that East Providence will continue to receive service if WPMZ(AM) is required to comply with the law ([see Footnote 14](#)) and that Bear ignores the harm that its proposed STA would cause to the public and Commission's processes.

On February 9, 1996, Bear filed a Revised Request for STA. Bear states that it has only just learned of Jefferson-Pilot's letter and that had it known of the complaint, Bear would have "responded earlier" to resolve the matter. Bear additionally requests an STA to operate immediately on 1640 kHz in the expanded band. As authority supporting this proposal, Bear cites two Commission STA authorizations to operate in the expanded band: 1660 kHz at Elizabeth, New Jersey; and 1640 kHz at Vallejo California. Bear states that it realizes that although such an authorization would not guarantee WPMZ(AM) a preference for permanent authority in the expanded band operation, it would preserve nighttime service for the residents of East Providence.

Discussion. Bear's current operation of WPMZ(AM) at nighttime with a power of 250 watts is a violation of Section 301 of the Communications Act of 1934, as amended ("Act"). That section provides in pertinent part that no person shall operate any apparatus for communications by radio except in accordance with the Act and with a license granted under the Act. Station WPMZ(AM) is only authorized to operate in daylight hours and has no authority for nighttime operation. See Station WPMZ(AM) license in Attachment 1. Although Bear contends that in 1986 the Commission staff orally advised WPMZ(FM)'s former counsel that the station could have nighttime service ([see Footnote 15](#)) it is well established that oral advice of the Commission can never substitute for an official action of the Commission. *See e.g., 220 Television, Inc., Dayton, Ohio*, 81 FCC 2d 575, 577 (parties have the obligation to ascertain facts from official records and may not rely upon the staff's oral advice). Station WPMZ(AM)'s license clearly indicates that WPMZ(AM) was only authorized for daytime operation and the burden rested with Bear to officially ascertain WPMZ(AM)'s nighttime authority prior to initiating such service. We therefore will not countenance any equity arguments raised by Bear with respect to preserving an unauthorized nighttime service in absence of a basis for STA that complies with the Commission's technical rules.

Although the Commission staff in the above-referenced STA Denial Letter has previously rejected Bear's June 30, 1986 STA request, in the interest of preserving a complete record, we will address the options Bear raised then, as well as Bear's latest option presented in the February 9, 1996 Amended Request for STA. [See Footnote 16](#). As indicated below, none of the options provided by Bear would enable an STA grant that conforms with the Commission's technical rules.

1. Permanent Operation of 250 Watts At Night.

Bear asks to continue its unauthorized nighttime operation. It contends to do so would be in the public interest. In support, Bear cites a Commission action taken with respect to noncommercial station WFMU(FM) as providing precedent. We disagree.

In the WFMU(FM) matter, an inadvertent error by a noncommercial station's engineer resulted in a number of years of operation with unauthorized facilities. *Letter from Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau ("Bureau") to Upsala College et al*, 1800B3-AJA, September 30, 1992 ("*Upsala*"). In that case, the Bureau determined that it was in the public interest to resolve a complex proceeding involving seven noncommercial FM stations by permitting a joint settlement whereby the parties would accept contour overlap in violation of 47 C.F.R. § 73.509. [See Footnote 17](#). One of the prohibited overlaps at issue in *Upsala* was due to the excess and unauthorized WFMU(FM) facilities. [See Footnote 18](#). The Bureau also agreed to permit WFMU(FM) to keep its previously unauthorized facilities as part of the joint settlement. The Commission staff reached this result on the basis that it was in the public interest to resolve a "unique interference" situation "which would otherwise require long and expensive hearings to resolve." *Upsala* at 17.

Bear's reliance on *Upsala* is misplaced. First, Bear's position in this matter does not arise from a single act of inadvertence as in *Upsala*. When Bear applied to acquire WPMZ(FM), it had an opportunity to ascertain the station's licensed facilities. Based upon the record, it appears that Bear failed to do so. Further, Bear continued to operate for a number of years in apparent disregard of its authorized facilities of which notice was contained in its station license. [See Footnote 19](#). Second, Jefferson-Pilot, unlike the *Upsala* parties, has not agreed to accept the interference caused by WPMZ(AM). Rather, Jefferson-Pilot requests that the Commission act to eliminate it.

More importantly, Bear fails to provide a public interest rationale that overcomes WBT(FM)'s right under the Commission's Rules to interference-free nighttime service. Station WBT(AM), Charlotte, North Carolina, is a Class A station operating on a clear channel and is entitled to protection in its extended area of primary and secondary service. See 47 C.F.R. § 73.21. The community of East Providence, Rhode Island, comes within WBT(AM)'s secondary service area. Bear's inability to obtain nighttime authority is due to the protection owed to WBT(AM) in that secondary service area. [See Footnote 20](#). Although Bear implies that denying WPMZ(AM) nighttime service would adversely affect the community's Hispanic population, the record indicates that at least one other station, with authorized nighttime service, provides programming for the area's Hispanic population. [See Footnote 21](#). Given the totality of the circumstances, we believe that the public interest in this case is better served by adhering to our long-standing technical rules protecting the clear channel AM service of Class A stations. [See Footnote 22](#). Therefore, we decline to grant an STA for WPMZ(AM)'s operation at 250 watts nighttime on its present channel.

2. Split Frequency Operation

Bear requests an STA to operate on a split frequency ([see Footnote 23](#)) on 1110 kHz daytime, and on 1120 kHz at night with 100 watts. Bear cites *Birach Broadcasting Corporation* ("*Birach*"), 4 FCC Rcd 4461 (1989), for the proposition that the Commission is willing to consider split frequency operation under unique circumstances. Bear's reliance, however, on this case is misplaced as the Commission, subsequent to *Birach*, amended 47 C.F.R. § 73.3516(a) to prohibit the acceptance of applications proposing split frequency operations. [See Footnote 24](#). In that proceeding, the Commission determined split frequency operations should generally be disfavored due to "the great level of complexity of split frequency operations and the potential for increased preclusion of other conventional facilities." *R&O* at 6302. While we can consider requests for waiver of 47 C.F.R. § 73.3576(a), the Commission has indicated that such requests must be accompanied by "sufficient supporting technical information" to "establish that no preclusion to other fulltime stations would occur," as well as an acceptable public interest showing. *R&O* at 6302. Bear fails to provide the requisite technical showing to support the subject request. Therefore, we are unable to grant a waiver and accompanying STA for split frequency operation.

3. Eventual Expanded Band Operation

Bear contends that the "unique" facts present here require that the Commission consider permitting WPMZ(AM) to migrate to the expanded band. Bear proposes two options to accomplish this migration: (1) recognize the interference that WPMZ(AM)'s current nighttime operation is causing to WBT(AM) and rank it on the priority listing of the expanded band; or (2) waive the daytime-only eligibility standard in the *R&O* to give a preference to WPMZ(AM) based upon a population of over 50,000, rather than the specified population of 100,000. [See Footnote 25.](#)

We find that neither option justifies a grant of STA upon the basis requested by Bear. With respect to the first option, this ranking applies to stations with authorized service. As noted above, WPMZ(AM) has never been authorized nighttime service. Regarding the second option, Bear asks the Commission staff to waive the daytime-only eligibility preference applicable only to those stations serving communities "over 100,000," and who are otherwise qualified under the Act and the Commission's Rules for relief. [See Footnote 26.](#) To waive this standard and provide Bear a preference ahead of other daytime-only stations that conform with the migration criteria established in the *R&O* would be manifestly unjust, and not in the public interest.

4. Immediate Expanded band Operation.

Bear requests an STA to begin immediate operations on the expanded band, regardless of whether WPMZ(AM) can eventually obtain an expanded band allotment. Bear cites to two examples where the Commission has granted STA to begin such operations: (1) WJEM(AM), Elizabeth, New Jersey; and (2) KXBT(AM), Vallejo, California. We conclude, however, that those stations' situations present distinguishable facts. In both cases, the Commission staff granted the STAs based upon the stations' showings that regardless of the improvement factor that would eventually be calculated for these stations, they were certain to receive an expanded band allotment. WPMZ(AM), however, has not made a similar showing. If WPMZ(AM) wishes to make such a showing in a future STA request, we will consider it. At this time, however, Bear presents no basis for granting STA to immediately operate in the expanded band.

Conclusion. The opposition filed by Carter Broadcasting Corporation IS GRANTED to the extent indicated herein. The February 7, 1996 Request for STA and the February 9, 1996, Revised Request for STA filed by Bear Broadcasting Company ARE DENIED. Further, Station WPMZ(AM) is ordered to immediately cease and desist unauthorized nighttime operation. Further unauthorized operation will subject WPMZ(AM) to daily forfeitures calculated in accordance with Section 503(b) of the Act.

Sincerely,

Linda Blair, Chief
Audio Services Division
Mass Media Bureau

cc: John M. Pelkey, Esquire Jefferson-Pilot Communications Company



Footnotes:

[Footnote 1:](#) Carter is licensee of station WRIB(AM), Providence, Rhode Island. Carter indicates that WRIB(AM) operates in a Spanish-language format that is directly competitive with WPMZ(AM).

[Footnote 2:](#) The record also includes a January 31, 1996 letter from Carter to F.C.C. Commissioner Andrew C. Barrett, III. In that letter, Carter alleges that WPMZ(AM) is operating at night without requisite authority and requests that the Commission review its records with respect to WPMZ(AM).

[Footnote 3:](#) Jefferson-Pilot references a January 18, 1995, letter to Mr. Vincent F. Kajunski, Engineer in Charge at the Commission's Boston field office. Jefferson-Pilot states that the station has been receiving complaints of interference to WBT(AM)'s nighttime signal.

[Footnote 4:](#) *See* Attachment 1, WPMZ(AM) license.

[Footnote 5:](#) Formerly WHIM(AM).

[Footnote 6:](#) Bear attaches a copy of a letter from communication counsel to the previous owner of WPMZ(AM). That letter states that the attorney had received oral confirmation from the Commission staff that WPMZ(AM) could initiate nighttime service with 250 watts power beginning on January 1, 1986.

[Footnote 7:](#) Commission records indicate that Bear was represented by counsel in applications filed with the Commission to acquire WPMZ(AM).

[Footnote 8:](#) "Split frequency operations utilize one assigned carrier frequency during daytime hours and a second carrier frequency during nighttime hours of operation." Review of the Technical Assignment Criteria for the AM Broadcast Service, *Report and Order*, ("R&O") 6 FCC Rcd 6273, 6301 (1991). That proceeding amended then 47 C.F.R. § 73.3516 to prohibit the filing of applications that proposed split frequency operation. *Id.* at 6459.

[Footnote 9:](#) To improve the AM service, the Commission adopted a migration program enabling a certain number of qualified stations to migrate to the portion of the band between 1600 kHz and 1700 kHz. *R&O*, 6 FCC Rcd at 6302.

[Footnote 10:](#) See Attachment 2: Letter from May Bradfield, Commission Analyst, to Bear Broadcasting Company, dated July 20, 1993.

[Footnote 11:](#) Bear states that the Engineer in Charge, Boston, of the Commission's Compliance and Information Bureau ("CIB"), issued WPMZ(AM) an Official Notice of Violation that required Bear to respond by February 12, 1996, as to the action it had taken to correct its unauthorized nighttime operation. On February 9, 1996, Bear filed a request with CIB for an extension of time to reply. By letter dated February 12, 1996, CIB granted Bear an extension of time until February 26, 1996, to reply.

[Footnote 12:](#) Bear indicates that WPMZ(AM) provides programming to East Providence's Hispanic population and attaches several letters from local Hispanic organizations in support of WPMZ(AM)'s service. Bear further argues the Commission cannot curtail "an existing local service upon which the residents have come to rely . . . without full consideration" (citing *Hall v. FCC* ("Hall") 237 F.2d 567, 572 (D.C. Cir. 1956)).

[Footnote 13:](#) Although Bear indicates that the subject Commission action occurred in a "telegram," our records indicate that the STA denial occurred in the context of the above-referenced letter.

[Footnote 14:](#) Carter indicates its station also serves the Hispanic community and that its main studio is located in East Providence, while Bear's main studio is in Pawtucket, Rhode Island. Carter also alleges that the "large Hispanic population" that Bear serves actually consists of 639 persons.

[Footnote 15:](#) See [note 6](#), *supra*.

[Footnote 16:](#) Bear's contention that the Commission staff did not formally respond to the June 30, 1993 STA request is incorrect. See STA Denial Letter, Attachment 2 ("Temporary authority to operate with 250 watts during nighttime hours is hereby denied"). Moreover, Bear provides no evidence whatsoever to support its allegation that the STA Denial Letter was a rogue staff action that Bear could disregard.

[Footnote 17:](#) Section 73.509 sets forth the prohibited contour overlaps for noncommercial stations operating in the reserved band.

[Footnote 18:](#) As part of the settlement, the Bureau agreed to waive Section 73.509 to permit the small overlap. *Id.*

[Footnote 19:](#) Section 73.1230 of the Commission's Rules requires, in relevant part, that licensees post the station license in a "conspicuous place and in such a manner that all terms are visible at the place the licensee considers to be the principal control point of the transmitter." 47 C.F.R. § 73.1230 (emphasis added).

[Footnote 20:](#) In Docket No. 87-131, the Commission determined that less than five daytime-only stations co-channel to clear channel stations were eligible for nighttime authority. 2

FCC Rcd at 7113. *See* Attachment 3 (Commission engineering study concluding that WPMZ(AM) does not qualify for nighttime service).

[Footnote 21:](#) As noted above, Carter states that WRIB(AM) operates a Spanish-language format that is directly competitive with WPMZ(AM).

[Footnote 22:](#) Bear's reliance on *Hall* is unpersuasive. *See* [note 12](#), *supra*. In *Hall*, the residents relied upon broadcast service authorized under the Act and the Commission's Rules. *Hall*, 237 F2d at 571. Here, however, Bear's service has never been authorized, and as shown above, directly contravenes the Act and the Commission's Rules.

[Footnote 23:](#) *See* [note 7](#), *supra*.

[Footnote 24:](#) Section 73.3516(a) provides in relevant part that "no application will be accepted for filing if it requests an alternate frequency or channel." 47 C.F.R. § 73.3516(a).

[Footnote 25:](#) Under the *R&O*'s priority scheme, "[d]aytime only stations located within the 0.5 mV/m-50% skywave contours of Class I stations and which are licensed to serve communities of 100,000 or more that currently lack a local fulltime aural service will be considered first priority among daytime-only facilities." *R&O*, 6 FCC Rcd at 6311.

[Footnote 26:](#) The *R&O* created this specific preference based upon guidance contained in Section 331(b) of the Act. That section of the Act instructs the Commission to do whatever is "technically feasible" to provide fulltime service to daytime-only stations in communities over 100,000. 47 U.S.C. § 331(b).